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No. 818

In the Supreme Court of the United States

OCTOBER TERM, 1964

JACK H. SCOTT, EDITH L. SCOTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 343–361) is reported at 226 F. Supp. 864. The opinion of the court of appeals (Pet. 13–15) is reported at 337 F. 2d 471.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1964 (Pet. 13, 17). The petition for a writ of certiorari was filed on January 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a riding club, organized and operated as a private association upon a military reservation with the consent of the installation commander, is a "federal agency" within the meaning of the Federal Tort Claims Act, so that the United States is liable for the negligent conduct of the Club's officers and employees.

STATUTE AND REGULATIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, provides in pertinent part:

> § 1346(b). Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * *
>
> § 2671. *Definitions*
>
> As used in this chapter and section 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the

United States but does not include any contractor with the United States.

"Employees of the government" include officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Army Regulations 230–5, entitled "Nonappropriated Funds and Related Activities," provides in pertinent part:

2. SCOPE. a. * * *

b. Private associations and funds thereof, organized, established, and operated by individuals acting not within the scope of their official capacity as officers, employees, or agents of the Government, and which are not established to provide essential morale and recreational facilities and services, are not subject to these and other departmental regulations governing nonappropriated funds as defined herein as instrumentalities of the Government. Such associations and funds thereof, except as otherwise provided by law or regulations, shall exist on a military installation only with the written consent of the installation commander. Such consent shall be contingent upon the following requirements and conditions as may be appropriate under the circumstances.

(1) That programs and activities conducted do not prejudice or discredit the military services or other agencies of the United States Government.

(2) That activities will not be conducted in the name of an installation or organization of the Army establishment.

(3) That neither the Army, nor a nonappropriated fund defined in these regulations shall assert claim to the assets of any such association nor shall the Army or any nonappropriated fund incur any obligations on behalf of or assume any of the obligations of such an association.

(4) That such associations will not engage in activities which are in conflict with authorized activities of nonappropriated funds defined in these regulations.

(5) That the nature and authorized function of such associations, together with provision for proper disposition of residual assets and liabilities upon dissolution, will be established in their constitution and by-laws, charter, or articles of agreement.

(6) That such associations are self-sustaining and receive no support assistance, or facilities from the Army or from nonappropriated funds defined in these regulations, except as provided for in AR 210–55, and AR 420–80.

(7) That the installation commander has authority to enforce compliance by such associations with the conditions herein enumerated, to inquire into their activities, and to withdraw his consent for their existence on the installa-

tion if deemed necessary in the interest of the Government.

* * * * *

3. DEFINITIONS. For the purpose of these and implementing regulations, the following definitions apply:

a. *Nonappropriated fund.* A nonappropriated fund prescribed by these regulations is an entity established by authority of the Secretary of the Army for the purpose of administering moneys not appropriated by the Congress for the benefit of military personnel or civilian employees of the Army and not incorporated under the laws of any State or the District of Columbia. Nonappropriated funds authorized by these regulations are instrumentalities of the United States.

STATEMENT

1. The basic facts were found by the district court (R. 344–349) and are undisputed here:

The Hunt Club at Fort Benning was organized as an association of members of the United States Army stationed at Fort Benning, Georgia, to provide facilities for horseback riding there (R. 344–345). Its constitution provided that it was to "be organized as a private association under paragraph 2b of AR 230–5" and that it "shall not operate as an instrumentality of the Federal Government" (App., *infra*, p. 13).[1] Its constitution also provided that its members were to be responsible for the Club's debts and that they would control the distribution of its assets if and when the

[1] "App." refers to the Appendix to this brief which sets forth the constitution of the Hunt Club.

Club dissolved; that, although approval of the Commanding General was a prerequisite to its operation on the post, the Club was to be self-governing, electing its own officers and Board of Governors; and that it was to be financially self-sustaining (App., *infra*, pp. 16–22). The Commanding General gave his consent to the operation of the Hunt Club in a remote area of the military reservation, which had once been a turkey farm (R. 344).

The Hunt Club, in operation, was self-sustaining financially—receiving its income from horse rentals, quartering fees, initiation fees and dues—and paid the government for electricity and other utilities which it used (R. 348). Although on occasion the Club was allowed to borrow, without charge, seats and loudspeaker equipment for horse shows, and Army trucks occasionally hauled wood shavings or sawdust to the Club's stable area, the Army never contributed any money or property to the Club (R. 348). When the Club needed facilities, such as stalls, corrals, and hitching rails, the Club bought the materials and the actual construction was performed by Club members on their own time (R. 347). The Club maintained and repaired such facilities (R. 349, 139, 142, 146–147).

Similarly, the Hunt Club was self-governing. While the Club constitution required its Board of Governors to "act on" any matter which the Commanding Officer of Fort Benning called to its attention (App., *infra*, p. 17), that provision was never called into operation, because the Commanding General never did refer any

matters to the Board of Governors (R. 348–358). The Commanding General did not have any authority to appoint the Board of Governors or officers of the Club, to direct or control its activities, or to set forth regulations or rules for its conduct (R. 360).

On May 17, 1961, petitioner Jack Scott, a Captain in the Army stationed at Fort Benning, was a member and Secretary of the Hunt Club, and owned a horse which was stabled at the Club (R. 349, 93–94, 98–99). His wife and daughter were injured when the horse, while tied to a horizontal hitching rail owned and maintained by the Club, pulled its head back, causing the rail to fall on them.

2. Petitioners brought this action against the United States under the Federal Tort Claims Act, alleging that the injury was due to the negligent construction or maintenance of the hitching rail (R. 3–4, 7). The action was premised upon the theory that the Hunt Club was a federal agency (R. 52–53). The government defended first on the ground that the Hunt Club was not an agency or instrumentality of the federal government, so that the United States was not liable under the Federal Tort Claims Act for the acts or omissions of the Club's officers or employees; alternatively, the government contended that the Club was not in breach of any duty owed petitioners, and that the accident was caused by petitioners' own negligence.

After a full trial, the district court, finding it unnecessary to reach the government's alternative defenses, ruled in a detailed opinion that the Hunt Club

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was not an integral part of the Army and was not subject to the degree of governmental direction and control which characterizes a federal agency within the meaning of the Federal Tort Claims Act. Accordingly, it ruled that the United States was not liable for the conduct of the Club's officers and employees under the Federal Tort Claims Act (R. 343–361).

The court of appeals affirmed *per curiam,* primarily on the basis of the district court opinion. While the court believed that the commanding general exercised "ultimate authority" over the Club in the sense that he could prohibit it from operating on the base, the court agreed with the district court that there was "insufficient nexus" between the Club and the Army to classify the Club as a federal agency under the Federal Tort Claims Act (Pet. 14). The court noted that all of the cases relied upon by petitioners involved nonappropriated fund activities which were expressly organized and operated as instrumentalities of the United States (Pet. 14–15).

ARGUMENT

The sole question presented by this case is whether a riding club, organized and operated as a private association upon a military installation, is a federal agency within the meaning of the Federal Tort Claims Act. While this issue is novel, it is neither important nor difficult. There is no conflict of decisions, and the result reached by both courts below was clearly correct.

1. The Hunt Club was organized as a "private association" of persons acting in their private capacity, and was operated in fact as a self-governing, financially independent private association. The courts below were therefore correct in ruling that it was not a federal agency within the meaning of the Federal Tort Claims Act.

Each of the decisions relied upon by petitioners (Pet. 7–8) involved either (1) a nonappropriated fund activity of one of the armed services, which was expressly organized and operated under regulations expressly making such activities instrumentalities of the United States (see *supra*, p. 5),[2] or (2) a recreational facility operated and maintained directly by the United States.[3] The Hunt Club involved here was

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[2] *United States* v. *Hainline*, 315 F. 2d 153 (C.A. 10), certiorari denied, 375 U.S. 895 (aero club organized and operated as an instrumentality of the United States found to be a federal agency); *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4) (United States held liable for negligence of an employee of a Navy officers' mess); *Grant* v. *United States*, 271 F. 2d 651 (C.A. 2) (same for employee of ship's service store); *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill.) (same for employee of post exchange); *Fournier* v. *United States*, 220 F. Supp. 752 (S.D. Miss.) (same for employee of officers' mess). In *Rizzuto* v. *United States*, 298 F. 2d 748 (C.A. 10), a suit by an employee of a Central Base Fund, an instrumentality of the United States, was held barred by the exclusivity provisions of a workmen's compensation statute (5 U.S.C. 150k).

[3] *Brown* v. *United States*, 99 F. Supp. 685 (S.D. W. Va.) (swimming pool operated and maintained by the United States at a naval station); *Brewer* v. *United States*, 108 F. Supp. 889, 891 (M.D. Ga.) (swimming pool was "constructed, maintained and operated by Government agents and was under their direct supervision and control").

plainly not operated by the United States, and the Club's facilities, including the hitching rail which caused the accident, were constructed and maintained by officers and employees of the Club (R. 349, 239–242, 142). There is also a clear difference between the kind of nonappropriated fund activities for which the United States has been held responsible in tort and the Club involved here.

Post exchanges and related activities are usually created by the commanding officer of a base and are operated under the executive direction, supervision, and control of military officers, acting in their military capacity, and receiving pay from appropriated funds. *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484; *Daniels* v. *Chanute Air Force Base Exchange,* 127 F. Supp. 920 (E.D. Ill.); AR 60–10; AFR 147–7, ¶ 20.[4] Not only are the profits from such activities used for governmental functions but Congress has supported such activities with appropriated funds, and on occasions brought profits from them into the Treasury. *Standard Oil Co.* v. *Johnson, supra,* 316 U.S. at 483–485. In contrast, the Hunt Club was specifically organized as a self-governing private association of persons acting in their private capacity, with the members being responsible for liabilities and having ownership of the assets. And, while the nonappropriated fund activities which are instrumentalities of the federal government are all governed by

[4] While the area club in *United States* v. *Hainline, supra,* was self-governing to a limited extent, it was subject to the supervision of the commanding officer of the base, as well as to detailed regulations (see R. 352–359).

extensive regulations issued by the Secretaries of the Army, Navy, and Air Force and even by statute, private associations, such as the Hunt Club, are excluded from their coverage. AR 230–5, ¶¶ 2b and 3a, *supra*, pp. 3–5;[3] 5 U.S.C. 150k.

It is true that the Hunt Club's constitution provided that "All activities of the Hunt Club will be subject to the approval of the Commanding General, Fort Benning" (App., *infra*, p. 22). However, the record is bare of any suggestion that prior approval of Club activities had to be obtained from the Commanding General or that he had ever prohibited or prevented the Club from doing anything. Rather, this provision merely confirms the inherent power of the Commanding Officer to exercise control, in an ultimate sense, over the activities of any organization on the base, by prohibiting it from operating there. That kind of control, however, is less than that exercised over the employees of independent contractors, and the United States is, of course, not responsible for the conduct of such employees under the Act. 28 U.S.C. 2671, *supra*, pp. 2–3. The decisions of the courts below

[3] Petitioner states that the decision below is in conflict with *United States* v. *Hainline*, *supra*, in that the former held "that Army regulations could enlarge or limit the liability of the United States under the Federal Tort Claims Act and could create a new and different definition of federal agency" (Pet. 9–10), while *Hainline* held to the contrary. In fact, however, the court of appeals here determined that the employees of the club were not employees of a Federal agency on the basis of their relationship with the federal government. It properly considered the regulations as one of several factors in determining this relationship.

are, therefore, wholly consistent with the decisions relied upon by petitioner, and there is no conflict of decisions.

2. The issue presented is, in any event, not of great significance. In the almost two decades since the adoption of the Federal Tort Claims Act, this is apparently the first and only case in which a plaintiff has sought to impose liability upon the United States for the conduct of officers or employees of a private association of persons acting in their private capacity. There is therefore no reason for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1965.

APPENDIX

CONSTITUTION

ARTICLE I—NAME

1. This association of the personnel of Fort Benning will be officially known as the HUNT CLUB. This is the designation under which this organization hereinafter referred to as the Hunt, shall operate and conduct business.

ARTICLE II—AUTHORITY

2. The Hunt shall be organized as a private association under the provisions of paragraph 2b of AR 230–5 with the approval of the Commanding General, Fort Benning, Georgia. The Hunt shall not operate as an instrumentality of the Federal Government by individuals acting outside the scope of their official capacity as official employees or agents of the Government.

3. The Hunt shall be responsible for the upkeep of facilities made available to it by the Commanding General. Repairs to these facilities necessitated by the operation of the Hunt shall be the responsibility of the Hunt. These facilities shall be returned in the condition in which received, except as authorized by the Commanding General.

ARTICLE III—PURPOSE

4. The purpose of the Hunt Club is to provide facilities where members may maintain horses or ponies,

and to provide regulated activities connected therewith. No activities of the Hunt shall substitute for activities conducted by other authorized clubs, associations, or organizations on the post.

ARTICLE IV—MEMBERSHIP

5. Membership in the Hunt shall be open to all military personnel and such additional personnel as authorized in paragraphs 5a and 5b below, and shall include the privileges of use of the facilities of the club by all dependents and guests of said member as set forth in the bylaws of the organization. Membership shall be limited by availability of facilities as determined by the Board of Governors. There shall be the following types of membership:

a. *Honorary Membership:*

Established by this constitution and by the initiating action of the Board of Governors. No responsibility for membership dues or fees, except as outlined hereinafter, and no voting or office holding privileges accrue to such membership in connection with the Hunt. Responsibility does accrue on such membership for payment of fees in effect during the life of membership chargeable for the boarding and maintenance of a personally owned mount, maintenance and repair of personally owned equipment, and/or rental or riding fees for mounts other than those personally owned and maintained by the member as applicable.

b. *Associate Membership:*

Established through invitation from, or by written application to the Board of Governors, and by compliance with pertinent provisions set forth hereinafter. Provisions of Associate Membership shall extend only to individuals and their dependents. Pay-

ment of initiation fees and monthly dues as established by the Board of Governors, and responsibility for no assessments; and no privilege of voting or office holding in connection with the business of the Hunt are features of such Associate Membership.

c. *Regular Membership:*

Established through written application to the Board of Governors and by compliance with the requirements set forth hereinafter, with voting and office holding privileges accruing to the regular member. Qualifications for this membership include:

(1) Payment of initiation fees and monthly dues as established by the Board of Governors.

(2) Agreement to pay pro rata share of any financial assessments that may be determined and levied upon the members by the Board of Governors in accordance with the provisions of the constitution as hereinafter stated.

6. Application for resignation from Regular Membership in the Hunt shall be made in writing to the Board of Governors. Such resignation shall be effective only after all mounts, for which the member is responsible, shall have been removed from the Hunt's facilities and all current accounts and pro rata share of financial responsibility with the Hunt have been settled. Such pro rata share shall be determined by the Board of Governors.

7. Regular and Associate Memberships may be terminated for reported violations of the Constitution, the Bylaws, Stable Regulations, or Post Regulations, or for any other act prejudicial of the interests of the Hunt, if substantiated by investigation by the Board of Governors. The provisions of paragraph 6 above shall apply as appropriate.

8. All general officers, permanently assigned to Fort Benning, and the Chief of Staff of the Post shall be extended honorary membership in the Hunt.

ARTICLE V—OFFICERS

9. The officers of the Hunt shall include a President, Vice-President, a Secretary, a Treasurer, and a Stable Officer. The officers and the Board of Governors shall be elected annually in February by a majority vote of the members present at a meeting called for that purpose. Each member shall be notified in writing at least 5 days prior to date of such meeting. Officers and members of the Board of Governors who cease to be regular members of the Hunt shall be replaced by the Board of Governors.

10. *The Board of Governors.*

a. The Board of Governors shall be comprised of the President, the Vice-President, the Secretary, the Treasurer, the Stable Officer, and not more than four additional members. No two members of the Board of Governors shall be from the same family. No member of the Board of Governors shall be a full time employee of the Hunt Club. The President shall be the chairman of the Board of Governors.

b. The duties of the Board shall be to:

(1) Prescribe the activities, services, and facilities of the Hunt, and the charges, rules, and regulations pertaining thereto.

(2) Rule on membership.

(3) Ascertain that all proper revenues have been received and accounted for, and authorize all expenditures.

(4) Prescribe the responsibilities and authority, and provide for the appointment, of such committees as may be necessary.

(5) Supervise the Vice-President, Secretary, Treasurer, and Stable Officer in the performance of their duties.

(6) Act upon matters presented by the Commanding General.

(7) Consider financial statements, inventories, reports of audits, boards, and committees and take appropriate action.

(8) Advise all members and employees that no member charged with any duty in connection with, nor any employee of the Hunt may accept or receive any gifts, privilege, or prerequisite from the Hunt, or from vendors or vendees of the Hunt.

c. The Board shall meet prior to the fifteenth day of each month. Its proceedings will be recorded, will indicate the members in attendance, and will include the most recent and properly certified financial statements of the Hunt fund. The minutes, signed by the President and Recorder, will be submitted, together with financial statements, to the Post Commander, as required.

11. *The President, and the Vice-President:*

a. The President shall be elected from the regular membership of the Hunt and for a term of one year. He shall be a member of a permanent garrison and shall be the Chairman of the Board of Governors. He shall perform such needed or appropriate tasks as may be required for the efficient conduct of the affairs of the Hunt.

b. The Vice-President shall be the Chairman of the Board of Governors in the absence of the President, and shall perform such other tasks as are prescribed by the President. He shall be a member of the permanent garrison, and shall be elected from the regular membership of the Hunt for a term of one year.

12. *The Secretary, Treasurer and the Stable Officers:*

The Secretary, Treasurer and Stable Officer will be appointed by the President from among the duly elected Board of Governors.

a. The Secretary shall act as recorder to the Board of Governors.

He shall, when directed by, or after obtaining approval of the President, cause appropriate publication of notice for all meetings of the Hunt. Such notice shall include date, time, place, and purpose of the meeting.

b. The Treasurer shall be the custodian of funds and property, and shall receive, disburse, and account for funds in accordance with AR 230–21 as a guide, and the policies and procedures prescribed by this Constitution and the Board of Governors:

(1) The accounting system shall be maintained in accordance with good business practices using AR 20–21 as a guide.

(2) The funds and accounts shall be subject to such audits and inspections as may be prescribed by the Post Commander.

(3) All funds due the Hunt shall be collected by the tenth of each month.

(4) All accounts owed by the Hunt shall be paid by the tenth of each month.

(5) A financial statement will be prepared for presentation at the regular monthly and annual meetings.

(6) The Treasurer shall:

(a) Call on the Internal Revenue Division, Office of the Comptroller for advice with regard to the receipt of monies, the maintenance of bank accounts, and the accounting for funds.

(b) Be financially liable for losses of Hunt funds and property, only where dishonesty, fraud, or obvious negligence on his part is established.

(c) Be responsible for accounts and records of property and transactions pertaining to the establishment, operations, and liquidation of the Hunt.

(d) See that the accounting system is maintained and operations conducted in such a manner as to provide adequate measures of internal control for the prevention of losses through dishonesty of employees or members.

(e) Within the specific authority vested in him by this Constitution, execute contracts in the name of the Hunt.

c. *The Stable Officer.*

The Stable Officer shall supervise and be responsible for the operation of the stables and associated facilities. He shall be assisted in the performance of his duties by such Assistant Stable Officers as may be appointed by the Board of Governors. The Stable Officer shall:

(1) Ensure strict compliance with the Stable Regulations.

(2) Establish and ensure proper stable management procedures.

(3) Initiate procurement of appropriate equipment and feed for the Hunt in accordance with policies and procedures established by the Board of Governors.

(4) Hire and discharge, with the approval of the Board of Governors, the necessary employees for the efficient operation of the stables.

(5) Ensure inspection of the stables as directed by the Board of Governors.

(6) Recommend to the Board of Governors necessary or advisable changes to the published Stable Regulations.

(7) Notify the Secretary and Treasurer by the second of each month as to the assessment to be made against each member for the operation of the stable facilities and for feeding the mounts of respective members.

ARTICLE VI—COMMITTEES

13. The Board of Governors shall provide for the appointment of such committees as may be necessary. The responsibilities, authority, and scope of functions of each committee shall be prescribed by the Board of Governors.

14. The actions of all elected officers and appointed committees shall be subject to review by the Board of Governors.

ARTICLE VII—PROPERTY

15. The property of the Hunt shall consist of such furniture, fixtures, and equipment as may properly come into its possession.

16. If and when the Hunt is dissolved, any unobligated funds and property will be disposed of in accordance with the recommendations of the members of the Hunt.

ARTICLE VIII—REVENUES AND EXPENDITURES

17. The Fort Benning Hunt is a nonprofit organization.

18. a. *Revenues.*

(1) The revenues of the Hunt shall consist of:

(a) Membership fees and/or dues.

(b) Riding fees.

(c) Assessments paid by the Regular Members.

(d) Boarding and maintenance fees.

(e) Proceeds from authorized sales of surplus Hunt property.

(f) Lesson fees.

b. *Expenditures.* The expenditures of the Hunt will comprise payments in connection with Hunt activities. All expenditures will be approved by the President, prior to payment, on the basis of policies established by the Board of Governors as recorded in the minutes of the meetings.

19. Assessments to cover the cost of operation shall be made on a pro rata basis depending on the number of mounts maintained. Special and/or additional feeds shall be provided by the members desiring them.

20. Special assessments may be made for the improvement of, or addition to, Hunt facilities or for special activities sponsored by the Hunt. Such assessments shall be made only with the approval of and in the manner provided by three-fourths of the members present at any meeting called for that purpose. Members shall be advised in writing prior to such meeting. These assessments shall be paid as announced with the notification of such assessment.

ARTICLE IX—GOVERNMENT

21. The Board of Governors shall govern and direct the activities of the Hunt in accordance with the provisions of the Constitution and the Bylaws.

22. There shall be at least one annual meeting of the Hunt, and such other meetings as the President may call. It shall be the duty of the President to call a Hunt meeting upon the written request of one-third of the members. Forty percent of the members shall constitute a quorum.

23. Voting by proxy shall not be permitted.

24. No family shall have more than one vote in elections or at any meeting.

25. Amendments to this Constitution and Bylaws shall be adopted by a two-thirds vote of the members present at any meeting called for that purpose.

26. All activities of the Hunt will be subject to the approval of the Commanding General, Fort Benning.

ARTICLE X—ADOPTION

27. This Constitution and Bylaws shall become effective upon approval by the Commanding General, Fort Benning.

U.S. GOVERNMENT PRINTING OFFICE: 1968